UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

No. 12 Civ. 9277 (RJS)

In re the Petition Under 28 U.S.C. Section 2254 for

KENNETH MORENO,

Petitioner.

MEMORANDUM AND ORDER

June 3, 2013

RICHARD J. SULLIVAN, District Judge:

Kenneth Moreno ("Petitioner") brings this petition for a writ of habeas corpus (the "Petition") pursuant to 28 U.S.C. § 2254, challenging his conviction in New York State Supreme Court, New York County, on three counts of official misconduct, for which he was sentenced to one year in prison. For the reasons set forth below, the Court denies the Petition.

I. BACKGROUND

A. Facts

On March 16, 2011, Petitioner, a former New York City police officer, was indicted on one count of rape in the first degree, three counts of burglary in the second degree, two counts of falsifying business records in the first degree, and twelve counts of official misconduct, all arising out of a series of alleged interactions with Katherine Chow ("Chow"), a New York City resident whom Petitioner had been dispatched to assist.[1] (Pet'r Mem. at 3; Opp. at 1.) Trial commenced on March 29, 2011. (Pet'r Mem. at 2; Opp. at 4.)

[1] The facts are drawn from Petitioner's memorandum in support of his Petition ("Pet'r Mem."), the memorandum of law in opposition to the Petition ("Opposition" or "Opp.") submitted by the District Attorney for the County of New York ("Respondent"), as well as the affidavits, declarations, and exhibits attached thereto. In ruling on this Petition, the Court also considered the transcripts from the state criminal trial ("Trial Tr.") and sentencing ("Sent. Tr."), as well as the transcript of the December 20, 2012 oral argument ("Arg. Tr.") on Petitioner's emergency motion to stay his sentence pending the resolution of his habeas petition (the "Emergency Motion" or "Motion").

The parties do not dispute that Chow was out celebrating with friends on the evening of December 6, 2008. (Pet'r Mem. at 3; Opp. at 1.) Intoxicated, Chow took a cab home, but when the cab arrived at her apartment, she would not or could not exit the vehicle. (Pet'r Mem. at 3; Opp. at 1; Trial Tr. 3393:9–12, 3394:13–14.) The cab driver called 9-1-1, and Petitioner responded with Police Officer Franklin Mata ("Mata"), his partner and later co-defendant. (Pet'r Mem. at 3; Opp. at 1.) At 1:13 a.m., Petitioner and Mata helped Chow to her apartment. (Pet'r Mem. at 4; Opp. at 1.) Petitioner then returned three more times throughout the course of the early morning: first at 1:59 a.m. – staying for seventeen minutes – and then at 2:59 a.m. and 4:27 a.m. – staying for more than a half hour each time. (Pet'r Mem. at 4; Opp. at 2.)

According to Chow's trial testimony, she had no recollection of leaving the bar where she had been celebrating with her friends. (Trial Tr. at 942:1–3.) She remembered only "being on the dance floor with all [her] friends" before she woke "up in the back seat of the cab, in front of her apartment building . . . vomiting over the side of the seat." (*Id.* at 942:1–7.) She then recalled "being inside of [her] apartment [building] in the stairway, and there were two police officers, one to [her] right and one behind [her,]" as she "tr[ied] to drag [her]self along." (*Id.* at 943:10–14.) She next remembered being "in [her] bathroom [where she was] on [her] knees hugging the toilet and just vomiting" (*id.* at 949:16–18), while one of the officers was repeating to her, "Drink the water" (*id.* at 950:21).

Chow's memory picked up again in her bedroom, where she woke "up in [her] bed . . . facedown on the mattress on her [stomach] and [her] legs [were] out." (*Id.* at 956:10–11.) She explained that she

> had been wearing tights that evening and [she] remember[ed she] woke up because somebody was rolling [her] tights down [her] legs and that rolling sensation when you take off tights is very unique, so [she] felt the rolling going down [her] leg.

(*Id.* at 957:12–15.) Chow's direct examination continued:

> Q: And what else do you remember about that moment?
> A: Hearing the [rustling] of clothing [and] Velcro ripping.
> Q: And what were you able to do or say when your tight[s] were being removed?
> A: Nothing.
> Q: And why was that?
> A: I was intoxicated[;] I couldn't say or do anything. My body was complete dead weight.
> Q: So what happened when your tights were being removed?
> A: I passed out.
> Q: And then what's the next memory that you have?
> A: I remember –
> Q: You need a minute? It's okay if you need a minute.
> [Court recessed, and Chow later continued.]
> A: I woke up to being penetrated from behind and I woke up because the action of him penetrating me was so hard that my head on my pillow, which is in front of the window, was moving towards the window like it was going to go through it.

(*Id.* at 957:23–958:10, 959:23–960:1.)

Chow explained that, while she was being penetrated, she "passed out again."

(*Id.* at 961:13.) She "was so intoxicated [that she] was dead weight. [She] couldn't move or say or do anything." (*Id.* at 961:18–19.) When she regained consciousness, she felt a person "in [her] bed to [her] left." (*Id.* at 962:25–963:1.) She recalled that the person in her bed asked if she wanted him to stay, but she did not respond. (*Id.* at 963:13–16.) The person "briefly . . . kissed [her] on [her] shoulder blade [while she] was still facedown . . . ." (*Id.* at 963:18–19.) At that point, she

> passed out and then . . . woke up to . . . two men[']s voices in [her] room . . . [; there was] a lot of commotion and [the] sound of [rustling] of clothing and . . . radio walkie-talkies . . . going off and on . . . . [T]here[were] hands pressing all around [her] on the mattress like [they were] looking for something . . . [and] a flashlight being flashed all over the bed.

(*Id.* at 964:23–965:7.) After that, Chow's next memory was waking up "in the same position that [she] had been in [her] bed and there [was] sunlight coming into [her] room . . . ." (*Id.* at 969:7–8.) She "realized that [she was] fully naked, aside from [her] bra . . . and there [was] vomit on the pillow . . . and [she] immediately [felt] the shock of the rape." (*Id.* at 969:11–13.)

At trial, Petitioner testified as to the following details of his visits to Chow's apartment. In the course of his first visit, Petitioner helped Chow take off one of her boots. (*Id.* at 3403:12–15.) Before he left, Chow "told [him] to take [her] keys . . . so [he] ended up taking the keys." (*Id.* at 3405:18–25.) After leaving, Petitioner used a fabricated identity and called 9-1-1 to falsely report a homeless trespasser in Chow's building. (*Id.* at 3410:16–3412:14.) When other law enforcement personnel were dispatched to handle Petitioner's false report, Petitioner intervened because he "wanted to respond." (*Id.*) In this way, Petitioner returned to Chow's building a second time.

Using Chow's keys, Petitioner re-entered her apartment. (*Id.* at 3416:2–3417:7–22.) During this visit, Petitioner offered to help Chow stop drinking. (*Id.* at 3426:14–3427:3 ("I told her I would go out with her one day. We could go out, you could hang out the whole entire night, not drink.").) When he returned the third time, Petitioner sang Jon Bon Jovi's "Living on a Prayer" to Chow (*id.* at 3432:17–22), and they discussed personal details about their respective relationships with other people (*id.* at 3433:2–6). Subsequent to both the second and third visits, Petitioner left to respond to calls regarding official police business. (*Id.* at 3428:21–25, 3433:13–16.)

At 4:11 a.m., after Petitioner's third visit to Chow's apartment, he arrived at his police station for a "meal" period. (*Id.* at 3434:15–3435:1.) Shortly thereafter, still in full uniform (*id.* at 3451:24–3452:3), Petitioner returned to Chow's building for the fourth time, using her key to enter her apartment (*id.* at 3436:1–3437:23).

According to Petitioner, he and Chow went into her bedroom during this final visit. (*Id.* at 3444:1–3445:18.) The lights were off (*id.* at 3446:7, 3456:2–8), and Chow went to her bed, where she sat with her upper body clothed in only a brassiere (*id.* at 3446:5–6, 3450:22–25). Chow stood from the bed and, at her prompting, Petitioner said that he "liked" her and, after further prodding by Chow, Petitioner "kissed her on her forehead." (*Id.* 3451:4–10.) Chow then touched Petitioner's police vest and placed Petitioner's hand on her bare stomach. (*Id.*

at 3456:14–17.) She also "started moving her buttocks area against [Petitioner's] groin area . . . for, maybe two seconds, maybe five seconds . . . ." (*Id.* at 3456:18–22.) According to Petitioner, the situation was "getting crazy. It was getting out of control." (*Id.*) Shortly thereafter, Chow "kind of yanked [Petitioner] down" onto her bed. (*Id.* at 3459:17.) He explained, "I guess I could have put up more resistance, [but] I didn't. She ended up pulling me down and I fell next to her, and then she asked me to stay. . . . [S]he grabbed my hand [and] she put it over her [while] my left hand [was] underneath her body. She kind of like came up on me, and I just held her. She just wanted to be held. I just held her." (*Id.* at 3459:17–3460:1.) Before he tried to pull away, Petitioner testified, "I rubbed her back. I might have kissed her back. I might have rubbed her back, held her hand[.] I was singing to her. I was holding her hand. I was rubbing her shoulder." (*Id.* at 3462:11–13.) According to Petitioner, at approximately 5:10 a.m., still in full uniform, he left Chow's apartment. (*Id.* 3464:19–3465:14.)

On May 26, 2011, the jury convicted Petitioner on three counts of official misconduct in relation to the second, third, and fourth visits to Chow's apartment. (Pet'r Mem. at 2; Opp. at 4.) Mata was also convicted on three counts of official misconduct, and both Petitioner and Mata were acquitted of all other charges. (Trial Tr. at 4605:19–4607:22; 4608:23–4609:16.) On August 8, 2011, the state trial judge sentenced Petitioner to one year in prison. (Sent. Tr. at 39:22–24, 40:15–16.) Mata was sentenced to sixty days in jail. (Pet'r Mem. at 21.)

Petitioner subsequently appealed his conviction to the Appellate Division of the New York Supreme Court, First Department, where he argued that the prosecution had not presented legally sufficient evidence to support a conviction for official misconduct and that the prosecution's summation deprived him of a fair trial. (Pet'r Mem. at 1; Opp. at 29.) A unanimous panel of the Appellate Division affirmed the conviction. *People v. Moreno*, 953 N.Y.S.2d 202 (N.Y. App. Div. 2012). Petitioner then sought leave to appeal to the New York State Court of Appeals, which was denied on December 14, 2012. *People v. Moreno*, 958 N.Y.S.2d 703 (N.Y. 2012).

B. Procedural History

Petitioner commenced this action on December 20, 2012 by filing a memorandum in support of the Petition (Doc. No. 1), as well as the Emergency Petition filed pursuant to 28 U.S.C. § 2251 (Doc. No. 2). Petitioner did not file an underlying habeas corpus petition, but the Court treated these filings as an adequate commencement of a habeas proceeding and directed Petitioner to file a proper petition forthwith. (Doc. No. 4.) That same day, the Court heard oral argument on Petitioner's Emergency Motion and found that Petitioner had not satisfied the standard set forth in Section 2251 for emergency relief. (Doc. No. 3; Arg. Tr. 27:25–28:24.) Petitioner filed the underlying Petition on January 7, 2013 (Doc. No. 19), and on January 22, 2013, Respondent filed its Opposition (Doc. No. 23). Having received no reply from Petitioner by February 20, 2013 – more than two weeks after a reply was due – the Court deemed the Petition fully briefed. (Doc. No. 30.)

II. DISCUSSION

A federal court may grant habeas corpus relief only if a claim that was adjudicated on the merits in state court (1) "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly

established Federal law, as determined by the Supreme Court of the United States," or (2) "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d). Petitioner raises four grounds on which relief should be granted. First, he argues that the evidence at trial was legally insufficient, so his conviction violated due process. (Pet'r Mem. at 1, 15–16.) Next, Petitioner claims that he was denied his right to due process and a fair trial because the prosecution misstated the law during its summation, and the state court judge failed to give a curative instruction. (*Id.* at 1–2, 17–20.) Third, Petitioner asserts that the disparity between his one-year sentence and Mata's sixty-day sentence rendered Petitioner's sentence "excessive" and amounted to a violation of due process and equal protection. (*Id.* at 2, 21–22.) Finally, Petitioner contends that he was denied the right to due process and a fair trial because the potential jury pool for his trial was tainted when an audiotape of a "controlled conversation" between Petitioner and Chow was leaked prior to jury selection. (*Id.* at 2, 23–25.) For the following reasons, Petitioner's arguments are unavailing and the Petition is denied.

A. Sufficiency of the Evidence

Petitioner argues first that the evidence adduced at his trial was insufficient to prove beyond a reasonable doubt that he was guilty of the elements of official misconduct. Of course, every element of a crime must be proved beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364 (1970). N.Y. Penal Law § 195.00 establishes the elements of official misconduct, stating that a "public servant is guilty of official misconduct when, with intent to obtain a benefit or deprive another person of a benefit[, h]e commits an act relating to his office but constituting an unauthorized exercise of his official functions, knowing that such act is unauthorized." *See also People v. Connolly*, 881 N.Y.S.2d 257, 259 (N.Y. App. Div. 2009) (affirming the conviction for official misconduct of a sheriff who directed officers to ticket members of the public who opposed his candidacy or criticized his work because these acts constituted "'flagrant and intentional abuse of authority by one empowered to enforce the law'" (quoting *People v. Feerick*, 93 N.Y.S.2d, 638, 643 (N.Y. 1999))). To determine that Petitioner's state conviction violated the federal Constitution, this Court must be convinced, "after viewing the evidence in the light most favorable to the prosecution, [that no] rational trier of fact could have found the essential elements" of official misconduct beyond a reasonable doubt. *Jackson v. Virginia.*, 443 U.S. 307, 319 (1979).

Petitioner focuses on one element in particular. He asserts that the prosecution "failed to prove beyond a reasonable doubt that [his] actions . . . were an exercise of his official function that related to his duties as a police officer." (Pet'r Mem. at 11.) The crux of Petitioner's argument is that "[t]he alleged acts . . . of rape and burglary cannot be considered acts under the guise of official functions; entering [Chow's] apartment on several occasions was also not an official function and did not relate to [his] position as a police officer." (*Id.* at 13–14.)

This argument misses the mark and, in fact, does not address the sufficiency of the evidence at all. Instead, Petitioner contends that his alleged acts were not the sort of acts that would "relat[e] to his office but constitute[e] an unauthorized exercise of his official functions." N.Y. Penal Law

§ 195.00. This is a legal argument – an argument about how state law ought to be interpreted.

Unfortunately for Petitioner, the interpretation of state law is not a matter in which a federal court may hold forth freely. To the contrary, for questions of state law, "a state court's interpretation . . . , including one announced on direct appeal of the challenged conviction, binds a federal court sitting in habeas corpus." *Bradshaw v. Richey*, 546 U.S. 74, 76 (2005). Here, the Appellate Division addressed this issue on direct appeal and held that, as a matter of New York law, "the three entries at issue were unauthorized exercises of [Petitioner's] 'official functions.' While [he] had no duty to follow up on [Chow] once [he] finalized the assignment, [his] actions nonetheless pertained to [his] official functions as [a] police officer[]." *Moreno*, 953 N.Y.S.2d at 204. Petitioner does not argue that the evidence adduced at trial was insufficient to prove his guilt under this interpretation of Section 195.00; he simply disagrees with the Appellate Division's interpretation. Because this Court is bound by the state appellate court's interpretation of state law, Petitioner's argument fails.[2]

B. Prosecutorial Misconduct

Petitioner next argues that the Assistant District Attorney engaged in prosecutorial misconduct that violated Petitioner's right to due process. When assessing allegations of error at a state trial, a federal habeas court's concern is not the supervision of state courts but the narrower issue of vindicating due process. *Donnelly v. DeChristoforo*, 416 U.S. 637, 642 (1974). "Habeas relief is not appropriate [if] there is merely a 'reasonable possibility' that trial error contributed to the verdict." *Bentley v. Scully*, 41 F.3d 818, 824 (2d Cir. 1994) (quoting *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993)). Rather, a petitioner "must demonstrate that he suffered actual prejudice because the prosecutor's comments . . . had a substantial and injurious effect or influence in the jury's verdict." *Bentley*, 41 F.3d at 824. To determine whether there has been a substantial and injurious effect, courts in this circuit consider "the severity of the misconduct; the measures adopted to cure the misconduct; and the certainty of conviction absent the improper statements." *Tankleff v. Senkowski*, 135 F.3d 235, 252 (2d Cir. 1998) (quoting *Floyd v. Meachum*, 907 F.2d 347, 355 (2d Cir. 1990)).

Here, Petitioner identifies two instances of prosecutorial misconduct arising from the prosecution's characterization, during summation, of Section 195.00's element of "intent to obtain a benefit":

> And when they were inside of that apartment for 17 minutes, the benefit to them and that's relating to the official misconduct charge is that they are not doing their job. They are hanging out up there doing who knows what[,] but we know that they

[2] Even if the Court were not bound by a state appeals court's interpretation of state law, the Court would nevertheless reach the same conclusion. By responding to a 9-1-1 call placed on Chow's behalf, Petitioner was simply doing his job. When he returned, in full uniform, three more times in barely three hours, he was clearly still "commit[ting] act[s] relat[ed] to his office." N.Y. Penal Law § 195.00. Conviction for official misconduct as to those three visits is therefore appropriate because a rational jury could find that these visits – although related to his office – were unauthorized, as reflected in part by the fact that Petitioner tried to hide them behind a phony 9-1-1 call, which he used as a pretense to return to Chow's home. Moreover, a rational jury could find that each of Petitioner's three return visits was designed to confer benefits – whether romantic or sexual or otherwise self-gratifying – on Petitioner and thus constituted wholly unauthorized, and ultimately disgraceful, behavior by a uniformed police officer.

> are not patrolling their sector[, which is] what they get paid to do. They are not paid to make house calls to check on Katherine Chow because no one knows that they are in that apartment checking on Katherine Chow . . . .

(Pet'r Mem. at 18; Trial Tr. at 4265:18–4266:1.) Shortly thereafter, the prosecution went on to explain that

> any time [Petitioner and Mata] went into that apartment, it could be [that] you believe it was for official misconduct that they went there [–] so they [could] hang out in the apartment and not patrol . . . . And while they are inside of that apartment, we know what they are not doing[: n]ot doing their job[, n]ot patrolling their sector[, n]ot helping the community in making sure it is safe. They are hanging out up in Katherine Chow's apartment.

(Pet'r Mem. at 18; Trial Tr. at 4271:21–4272:25.)

As the Appellate Division concluded when addressing this same argument on direct appeal, the prosecutor's characterization of benefit was erroneous. *Moreno*, 953 N.Y.S.2d at 204 ("We conclude that in her summation the prosecutor misstated the law regarding the 'benefit' element of official misconduct by suggesting that mere neglect of duty would qualify as benefit.") At trial, Petitioner objected and sought a curative instruction. (Pet'r Mem. at 18–19; Trial Tr. at 4291:8–4296:5.) Although the Court declined to give a direct curative instruction (Pet'r Mem. at 19; Trial Tr. at 4425:8–12, 4436:20–21), it reminded the jury several times that summations are mere argument and that the court is the only authority with regard to legal standards. (Trial Tr. at 3988:24–3989:4 (prior to summations), 4234:22 (during prosecution's summation), 4441:23–4442:2 (prior to charge).) The parties echoed this guidance. (*Id.* at 3995:10–12 (Petitioner's summation), 4070:18–22 (same), 4234:23–25 (prosecution's summation), 4301:1–5 (same).) Moreover, when the court did instruct the jury on the law, it correctly stated that, when the statute refers to a "benefit," it is referring to "any gain or advantage to the beneficiary[, and] that includes any gain or advantage to a third person pursuant to [the beneficiary's] desire or consent of the beneficiary." (*Id.* at 4466:14–17); *see also Moreno*, 953 N.Y.S.2d at 204 ("[T]he court instructed the jury that the attorneys' summations were merely argument, advised the jury that the court, not the attorneys, would instruct the jury on the law, and delivered a correct charge on official misconduct."). The Court assumes that the jury followed these instructions. *See Richardson v. Marsh*, 481 U.S. 200, 206 (1987).

Applying *Tankleff's* standard of "substantial and injurious effect," Petitioner's claim of prosecutorial misconduct hardly rises to the level of a due process violation. *Tankleff's* first two factors for measuring the effect of the misconduct – its severity and the steps taken to cure it – both weigh strongly in favor of the prosecution. There is an important distinction "between ordinary trial error of a prosecutor and that sort of egregious misconduct [that] amount[s] to a denial of constitutional due process." *Donnelly v. DeChristoforo*, 416 U.S. 637, 647–48 (1974). The prosecution's remarks here, in the midst of a lengthy summation after a seven-week trial, more closely resemble ordinary trial error than egregious

misconduct. *See id.* at 640 (finding that the due process clause was not violated by "two remarks made by the prosecutor during the course of his rather lengthy closing argument to the jury" about his personal opinions as to defendant's guilt and about defendant's beliefs as to his own guilt); *Chalmers v. Mitchell*, 73 F.3d 1262, 1270–71 (2d Cir. 1996) (declining to overturn a conviction after prosecutor misstated the burden of proof five times in his summation because the repeated error was not "imprinted . . . in the minds of the jurors," and the court's "own reasonable doubt instruction" properly defined the burden of proof); *see also United States v. Young*, 470 U.S. 1, 11 (1985) ("[A] criminal conviction is not to be lightly overturned on the basis of a prosecutor's comments standing alone."); *United States v. Rodriguez*, 968 F.2d 130, 142 (2d Cir. 1992) ("It is a 'rare case' in which improper comments in a prosecutor's summation are so prejudicial that a new trial is required." (quoting *Floyd*, 907 F.2d at 348)). And in any event, the court rectified the prosecution's misstatement and made clear to the jury that only the court's instructions of law mattered.

Tankleff also requires the Court to consider the certainty of conviction absent the prosecution's improper remarks. Here, the misstatement with regard to the nature of a "benefit" likely had no effect on the jury's verdict. Even if mere neglect of duty is not a benefit, the intent to obtain a sexual benefit satisfies Section 195.00, *Moreno*, 953 N.Y.S.2d at 204, and the jury was presented with copious evidence relating to sexual benefit – including Petitioner's *own* testimony about multiple visits to Chow's apartment, personal conversations in her bedroom, intimate touching on her bed, and kissing (*see generally supra* Section I.A). Likewise, the prosecution thoroughly argued the theory of sexual benefit during its summation. (*See, e.g.*, Trial Tr. at 4265:6–7 ("This was about Moreno having sex with a drunk, vulnerable, helpless woman."), 4333:19 ("[Mata] helped his partner have sex . . . .").) And even if the jury only credited Petitioner's own testimony, the only rational inference to be drawn was that Petitioner anticipated a personal benefit from the intimate exchanges about which he testified.

The prosecution misstated the law when it asserted that neglecting police duties constitutes a "benefit" under Section 195.00, but this mistake was not egregious, was not left uncorrected, and, ultimately, was not prejudicial in light of the extensive inculpating evidence and argument showing that Petitioner intended to obtain a personal benefit from Chow. Consequently, Petitioner has not made out a violation of due process that would justify granting his Petition.

C. Exhaustion

Petitioner's final claims fail on procedural grounds. Before seeking federal habeas relief, a petitioner must first exhaust his federal constitutional claims in state courts. *See* 28 U.S.C. § 2254(b)(1)(A); *Cotto v. Herbert*, 331 F.3d 217, 237 (2d Cir. 2003). "State remedies are deemed exhausted when a petitioner has: [(1)] presented the federal constitutional claim asserted in the petition to the highest state court (after preserving it as required by state law in lower courts) and [(2)] informed that court (and lower courts) about both the factual and legal bases for the federal claim." *Ramirez v. Att'y Gen.*, 280 F.3d 87, 94 (2d Cir. 2001). Notably, "raising a federal claim for the first time in an application for discretionary review to a state's highest court is insufficient for exhaustion purposes." *St. Helen v.*

Senkowski, 374 F.3d 181, 183 (2d Cir. 2004) (citing *Castille v. Peoples*, 489 U.S. 346, 351 (1989)).

Here, Petitioner failed to exhaust his claims with regard to excessive sentencing and jury taint. At trial, he made no objection based on potential jury taint. (Arg. Tr. 11:21–13:20[3]; Opp. at 62–63.) Moreover, Petitioner raised neither the issue of sentencing nor jury taint before the Appellate Division of the New York Supreme Court. *See Moreno*, 953 N.Y.S.2d 202; (Pet'r Mem. at 21, 25). Furthermore, Petitioner did not properly raise these issues before the New York Court of Appeals; he merely filed a petition for leave to appeal, which that court denied. *Moreno*, 958 N.Y.S.2d at 703. Consequently, Petitioner failed to exhaust these claims, *see Senkowski*, 374 F.3d at 183, so they are barred, *see Cotto*, 331 F.3d at 237.

Even if the Court were to reach the merits, however, Petitioner's claims would not support a writ of habeas corpus. His sentence falls within the statutory range for misdemeanors of this kind, *see* N.Y. Penal Law §§ 70.15(1), 195.00, and with regard to his complaint over the disparity between his sentence and Mata's, a defendant generally "has no constitutional or otherwise fundamental interest in whether a sentence reflects his or her relative culpability with respect to his or her codefendants." *United States v. Bokun*, 73 F.3d 8, 12 (2d Cir. 1995); *see also Pulley v. Harris*, 465 U.S. 37, 43–44 (1984) (distinguishing the disproportion between a crime and the sentence imposed – which could implicate the Eighth Amendment – from the disproportion between sentences imposed for the same crime committed by two different defendants – which did not implicate the Eighth Amendment). As a result, Petitioner's excessive sentencing claim would fail on the merits.

With regard to Petitioner's claim that the jury was tainted when an audiotape of a "controlled conversation" was leaked to the press, he does not make out a "presumption of prejudice[, which] attends only the extreme case." *Skilling v. United States*, 130 S. Ct. 2895, 2915 (2010). To the contrary, he points to only one *New York Post* article that featured the conversation online on February 19, 2011 and in print the next day. (Pet'r Mem. at 24.) This isolated instance of alleged adverse pretrial publicity is hardly extreme and would be insufficient, on its own, to render Petitioner's trial constitutionally improper. *See Knapp v. Leonardo*, 46 F.3d 170, 177 (2d Cir. 1995) (holding that a claim of unconstitutional prejudice from pretrial publicity requires some suggestion of "the existence of a deep-rooted pattern of prejudice," not mere citations to newspaper articles) (citing

[3] At oral argument on Petitioner's Emergency Motion, the Court probed Petitioner's efforts to exhaust any issues of jury taint.

> THE COURT: It doesn't sound like anybody actually said, ["W]e believe the jury pool has been tainted and that is something that has to be addressed.["] If that argument was made [– "]we need to adjourn, we need to move the trial, we need to ask now an extra set of questions of all the jurors to make sure that they haven't been tainted by what appeared in the papers[" –] and the judge denied that, then I think there would be a live issue. But it sounds like nobody asked that.
>
> [PETITIONER'S COUNSEL]: I don't believe they asked for change of venue.
>
> THE COURT: Or any of the other things I just mentioned[?]
>
> [PETITIONER'S COUNSEL]: Not to my knowledge.

(Arg. Tr. at 13:8–20.)

Dobbert v. Florida, 432 U.S. 282, 303 (1977) ("[E]xtensive knowledge in the community of either the crimes or the putative criminal is not sufficient by itself to render a trial constitutionally unfair.")); *Billy-Eko v. United States*, 8 F.3d 111, 117 (2d Cir. 1993) (concluding that "several articles that ran over wire services . . . , two articles in dailies that were not published [in the trial venue] and one article in the *New York Times*" were "not significant, and could not have materially affected the jurors' verdict"), *abrogated on other grounds by Massaro v. United States*, 538 U.S. 500 (2003); *United States v. Maldonado-Rivera*, 922 F.2d 934, 967 (2d Cir. 1990) (denying a motion to transfer venue upon a finding of "slightly more than one article per week over a three-year period" running through trial). Consequently, Petitioner's claim of jury taint would be unavailing.

In any event, since Petitioner did not exhaust his claims as to excessive sentencing and jury taint, they are barred under Section 2254. Accordingly, Petitioner has presented no grounds on which this Court is authorized to grant his petition.

III. Conclusion

For the foregoing reasons, Petitioner has failed to establish his entitlement to habeas relief pursuant to 28 U.S.C. § 2254. Accordingly, the Court denies the Petition. In addition, because Petitioner has not made a substantial showing of the denial of a constitutional right, a certificate of appealability will not issue. *See* 28 U.S.C. § 2253(c)(2); *Love v. McCray*, 413 F.3d 192, 195 (2d Cir. 2005). The Clerk of the Court is respectfully directed to enter judgment in favor of Respondent and to close this case.

SO ORDERED.

RICHARD J. SULLIVAN
United States District Judge

Dated: June 3, 2013
New York, New York

* * *

Petitioner is represented by Stephen N. Preziosi, the Law Office of Stephen N. Preziosi, P.C., 570 Seventh Avenue, Sixth Floor, New York, New York 10018.

Respondent is represented by Christopher Patrick Marinelli, Office of the District Attorney, New York County, One Hogan Place, New York, New York 10013.